Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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(2)

No. 84-168

In the Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. EVEN, PETITIONER

v.

NATIONAL GUARD BUREAU AND
JOHN A. JOHNSTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner challenges the decision of the Michigan Air National Guard not to retain him as a member of the Guard.

1. Air National Guard Regulations (A.N.G.R.) establish a program of "selective retention" of officers who have served more than 20 years and are eligible for retirement pay. A.N.G.R. 36-05 (Aug. 15, 1974) provides in part that "[a]ll officers with 20 years of Federal service qualifying for retirement pay * * * will be discharged unless specifically recommended for retention by [the] appropriate board in accordance with ANGR 36-06" (para. 13.a(10); C.A. App. 68a). A.N.G.R. 36-06 (Oct. 7, 1977) (Pet. App. E1-E11) explains the selective retention policy as follows (para. 2; Pet. App. E2-E3):

> Membership in the Air National Guard of the United States is not an inherent right of any individual. It is a privilege and confers upon an individual an obligation to serve in the active military service in the event of mobilization or emergency, or at such other times as the national security may require. A continuing program of vitalization of the Air National Guard is essential to avoid loss of combat readiness in a maturing force. Lack of promotion possibility and stagnation in the senior grades preclude providing for progression of qualified officers into positions of greater responsibility at the proper phase-points of their careers. To accomplish this program of officer development, all ANG commissioned officers and warrant officers with over 20 years of qualifying service for retirement will be reviewed each year for consideration of retention or separation. This program will be achieved by controlled attrition and selective retention of officers * * *.

In 1981, after review by a Vitalization Board, the Michigan Air National Guard determined not to retain petitioner, who had served in the Guard since 1947. Petitioner was honorably discharged from the Guard. Pet. App. C1.[1] Petitioner had an opportunity to send a letter to the Vitalization Board when it was considering whether to recommend his retention but he had no right to appear in person before the Board (*ibid.*).

2.a. Petitioner then brought this action in the United States District Court for the Eastern District of Michigan, contending that the discharge procedure denied him due process. In alleging that he had an entitlement to continued

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[1]This discharge automatically terminated petitioner's employment as a civilian technician with the Guard (Pet. App. C1). See 32 U.S.C. 709(b) and (e)(1); *Tennessee* v. *Dunlap*, 426 U.S. 312 (1976).

service in the Guard, petitioner relied on a letter dated January 24, 1973 and approved by the Secretary of the Air Force, a copy of which is reproduced below (App., *infra*, 1a-2a).

On cross motions for summary judgment, the district court ruled against petitioner (Pet. App. B1-B4). The court noted that petitioner's "only claim is that [the] decision to discharge him violated his constitutional right to due process" (*id.* at B2). The district court stated that, in determining whether to "review" this claim, it would consider the four factors specified by *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971):

> (1) "[t]he nature and strength of plaintiff's challenge to the military determination"; (2) "[t]he potential injury to the plaintiff if review is refused." (3) "[t]he type and degree of anticipated interference with the military function;" and (4) "[t]he extent of anticipated interference with the military function."

Pet. App. B2, quoting 453 F.2d at 200 (brackets added by the district court). The district court then stated that petitioner mischaracterized the January 24, 1973 letter in suggesting that it gave him an entitlement to be retained in the Guard (Pet. App. B3): "We find that the letter clearly states the intention to retain such technicians until age sixty only if they remain 'fully qualified' under all regulations, including the regulation under which [petitioner] was recommended for nonretention." The court then reasoned as follows (*id.* at B3-B4):

> We have concluded that we must deny [petitioner's] request that we review the decision to discharge him. [Petitioner's] due process claim is somewhat tenuous at best. [Petitioner] was honorably discharged with full military and civil service retirement benefits and, therefore, he will suffer little potential injury. Most importantly, we find that review of this decision would

> interfere substantially with the military's duty to insure that a viable armed forces are available to meet any emergency that might arise. Finally, we believe that military authorities are better equipped to make this decision. We have no basis for making a determination that an individual is suitable for retention in the armed forces.

b. The court of appeals affirmed (Pet. App. C1-C2). It first held that petitioner's interest in being retained in the Guard was not protected under the Due Process Clause (*id.* at C2; citation omitted):

> [W]e are not persuaded that the communication from the Chief of Staff of the Air Force to the Secretary of the Air Force was sufficient under the circumstances to create an expectation of employment amounting to a property interest protectable under the Due Process clause of the Fifth Amendment. As [the district court] noted, "the letter clearly states the intention to retain such technicians until age 60 only if they remain 'fully qualified' under all regulations, including the regulations under which [petitioner] was recommended for non-retention." Thus, [petitioner's] severance from the National Guard did not require the procedural safeguards which would otherwise attend the termination of a property interest in the form of a legitimate expectation of continued employment. See *Perry* v. *Sindermann,* 408 U.S. 593, 599-603 [(1972)].

The court of appeals then briefly remarked (Pet. App. C2): "Also, we do not believe the district court erred in applying the test enunciated by the Fifth Circuit in *Mindes* v. *Seaman* * * *."

3.a. Petitioner's principal contention (Pet. 6-9) is that this Court should decide whether his procedural due process claim is reviewable. But even if petitioner were correct in asserting that his claim is reviewable, he would not be

entitled to relief. Both courts below — the district court implicitly,[2] and the court of appeals explicitly — rejected petitioner's claim on the merits, and their conclusion was correct.[3]

Petitioner may invoke the protections of the Due Process Clause only if his interest in continued membership in the Guard is a protected "liberty" or "property" interest. Petitioner makes no claim that A.N.G.R. 36-05 or 36-06 creates such an interest, and no such claim would be plausible; the decision whether to retain a member of the Guard is made by the State Adjutant General on the recommendation of the Vitalization Board (A.N.G.R. 36-06, para. 11.b(1)), and the regulations "place no substantive limitations on [the Adjutant General's] discretion" (*Olim* v. *Wakinekona*, 461 U.S. 238, 249 (1983); see *Board of Regents* v. *Roth*, 408 U.S. 564, 577-578 (1972)). They therefore create no liberty or property interest.

Petitioner instead relies on the January 24, 1973 letter.[4] But petitioner suggests no reason for believing that that

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[2]The district court stated that petitioner's claim was "somewhat tenuous at best" (Pet. App. B3) and it specifically found that the sole basis of petitioner's claim — the January 24, 1973 letter — did not confer on petitioner an interest protected by the Due Process Clause (*ibid.*).

[3]In *Thompson* v. *Stetson*, cert. denied, 454 U.S. 823 (1981), the Court declined to consider a claim by a member of a state Air National Guard that his nonretention decision violated the Due Process Clause. Petitioner's claim on the merits is indistinguishable. We are serving counsel for petitioner with a copy of our memorandum in opposition in *Thompson* (No. 80-1887).

[4]Petitioner also discusses (Pet. 4) a 1970 opinion letter by the legal adviser to the National Guard Bureau. As petitioner acknowledges (Pet. 4 n.*), this letter was not a part of the district court record and was not submitted to the court of appeals until after its decision. It therefore should not be considered by this Court. See, *e.g.*, *Coalition for Responsible Regional Development* v. *Brinegar*, 518 F.2d 522, 527 (4th Cir. 1975); *Norris* v. *United States*, 423 F.2d 695 (9th Cir.), cert. denied, 400

letter — which only "recommend[s]" certain actions and does not modify any regulation — should take priority over the regulations that specifically govern non-retention. Moreover, the letter is, on its face, not addressed to officers subject to the non-retention policy of A.N.G.R. 36-06; instead, the letter recommends that the Air Force not frustrate expectations that may have arisen because of Pub. L. No. 85-861, § 28, 72 Stat. 1562 (Pet. App. F1), which exempts certain officers from removal that would otherwise be required by certain "provision[s] for mandatory promotion in chapter 837 of title 10, United States Code * * *." As the courts below noted, the letter specifically does not recommend the retention of members of the Guard who are not otherwise "fully qualified," and petitioner was determined not to be qualified for retention under A.N.G.R. 36-05 and 36-06.[5]

U.S. 838 (1970); *United States* v. *Summit Fidelity & Surety Co.*, 408 F.2d 46, 48 (6th Cir. 1969). The opinion has been in existence for 14 years, and there is no reason for an exception to the well-established rule that evidence must be submitted to the trial court to be considered on review.

In any event, the opinion letter is just that — a statement of the legal adviser's opinion — and does not purport to modify any regulations. Moreover, it appears to be addressed to the same question as the January 24, 1973 letter (see page 6, *infra*).

[5]Petitioner asserts (Pet. 8-9) that there is a conflict between the decision below and *Dillard* v. *Brown*, 652 F.2d 316 (3d Cir. 1981), over the extent to which military determinations are reviewable. As we explained in our memorandum in opposition in *Nieszner* v. *Orr*, cert. denied, 460 U.S. 1022 (1983) (No. 82-1007), the differences between the Third Circuit's approach in *Dillard* and the approach of those courts of appeals that have followed *Mindes* v. *Seaman*, *supra*, may be more apparent than real. (We are serving counsel for petitioner with a copy of our memorandum in opposition in *Nieszner*.) In any event, all *Dillard* purports to require is that a court review certain military determinations on the merits instead of considering them nonreviewable (see 652 F.2d at 323), and the courts below rejected petitioner's claim on the merits. Petitioner therefore cannot invoke any conflict as a reason for review by this Court.

b. Finally, petitioner, citing black letter law on the granting of summary judgment, asserts that there were material issues of fact in this case. But petitioner himself moved for summary judgment, and he does not identify any factual evidence in the record that would enable him to show that he has a protected property interest. This fact-bound claim therefore plainly does not merit review by the Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1984

DOJ-1984-11

APPENDIX

DEPARTMENT OF THE AIR FORCE
OFFICE OF THE CHIEF OF STAFF
UNITED STATES AIR FORCE
WASHINGTON, D.C. 20530
24 JAN 1973

SUBJECT: Extension of Officer Air Technicians Employed Prior to 1 July 1955

TO: SAF/OS

1. On 1 July 1955, the effective date of ROPA, the Air National Guard had 656 officers including 12 generals and 53 colonels employed as air technicians. Attrition and promotions have reduced the total pre-1955 technicians to 339 but increased the number of generals to 20 and colonels to 134. These officers have been under the impression since 1 July 1955 that Section 28, Public Law 85-861 assured them of retention in their civilian employment until age 60. This opinion also prevailed in the National Guard Bureau and the Air Force.

2. On 13 October 1972, AF/JAC ruled that PL 85-861 did not extend the authority for retention above the grade of lieutenant colonel but pointed out that such authority was delegated to the Secretary of the Air Force in 10 USC, 8851(c).

3. In light of the policy followed over the past 17 years under the presumed authority of PL 85-861, I recommend that where the officer is fully qualified to hold his military position and properly performing his technician job, he should be retained in his technician employment. I further recommend that this determination be made by the Secretary of the Air Force with

regard to general officers and by the Chief, National Guard Bureau for officers of other grades.

/s/ [John D. Ryan]

Chief of Staff

Approved:

/s/ [Robert Seamens]

Secretary of the Air Force